

Inter-State/Cross-Border Co-operation in Criminal/ Customs Matters in Europe

- extradition: important changes
- mutual assistance in criminal matters: major changes
- transfer of proceedings: limited EU output
- transfer of the enforcement of foreign judgements: punctual changes
- ne bis in idem: no progress since 1990

Extradition

- traditional/present co-operation levels
- new/future co-operation levels

Traditional/Present Co-operation Levels

- Council of Europe (hereafter: CoE)
 - ratified by Estonia on 28 April 1997
 - 1957 European Convention on Extradition
 - 1975 Additional Protocol
 - 1978 Second Additional Protocol
 - ratified by Estonia on 27 March 1997
 - 1977 European Convention on the Suppression of Terrorism
- Bilateral level

New/Future Co-operation Levels (1)

- Schengen
 - Schengen Implementing Convention (SIC) Articles 59-66
 - intended to supplement and to facilitate the implementation of the 1957 CoE Convention
- European Political Co-operation
 - pre-Maastricht EU acquis
 - Agreement of 26 May 1989 between the EC Member States on the simplification and modernization of methods of transmitting extradition requests

New/Future Co-operation Levels (2)

- EU
 - 1995 Convention on simplified extradition procedure
 - 1996 Convention relating to extradition
 - future
 - Article 30, under 2 TEU (post-Amsterdam): facilitating extradition
 - Action Plan of 3 December 1998: improvements (rules to reduce delays) and extradition in relation to procedures *in absentia*
 - October 1999 Tampere European Council: further simplification extradition procedures

Schengen Implementing Convention (Part of the Acquis)

- interruption of prescription - amnesty: ruled by law requesting State only (Article 62)
- extradition duty for matters of excise duty, VAT and customs duties (Article 63)
- report included in the SIS in accordance with Article 95: same force as a request for provisional arrest under the 1957 CoE Convention (Article 64)
- transmission allowed via Ministry (Article 65)
- informal (simplified) procedure possible (Article 66)

1996 Convention relating to extradition (1)

- supplementing
 - 1957 CoE Convention on Extradition
 - 1977 CoE Convention on the Suppression of Terrorism
 - SIC

1996 Convention relating to extradition (2)

- new developments
 - extraditable offences (changes in threshold)
 - conspiracy/association to commit offences: dual criminality rule abandoned
 - political offence exception abandoned
 - fiscal offences: SIC improved
 - extradition of own nationals
 - prescription - amnesty: SIC refined
 - specialty principle abandoned
 - transmission by fax allowed: EPC acquis incorporated

Mutual Assistance in Criminal Matters

- traditional/present co-operation levels
- new/future co-operation levels

Traditional/Present Co-operation Levels

- CoE
 - ratified by Estonia on 28 April 1997
 - 1959 European Convention on mutual assistance in criminal matters
 - 1978 Additional Protocol to the 1959 CoE Convention
 - 1978 Additional Protocol to the European Convention on Information on Foreign Law
 - signed by Estonia on 25 June 1999/not ratified
 - 1990 European Convention on laundering, search, seizure and confiscation of the proceeds of crime
 - future
 - Second Additional Protocol to the 1959 CoE Convention (PC-OC)
- Bilateral level

New/Future Co-operation Levels (1)

- Schengen
 - Articles 40 and 48-53 SIC
 - intended to supplement and to facilitate the implementation of the 1959 CoE Convention

New/Future Co-operation Levels (2)

- EU (1)
 - 1996 Joint Action concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the EU
 - 1997 Convention on mutual assistance and cooperation between customs administrations (Naples II)
 - 1998 Joint Action on the creation of a European Judicial Network
 - 1998 Joint Action on good practice in mutual legal assistance in criminal matters

New/Future Co-operation Levels (3)

- EU (2)
 - 1998 Joint Action on the laundering of money, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime
 - 1999 Draft Convention on mutual assistance in criminal matters
 - Draft Protocol to the EU Convention on mutual assistance in criminal matters
 - October 1999 Tampere European Council
 - principle of enhanced mutual recognition of judicial decisions
 - Eurojust

Schengen Implementing Convention (Part of the Acquis)

- cross-border observation (Article 40)
- wider scope (Article 49)
- excise duty, VAT and customs duties (Article 50)
- letters rogatory for search or seizure (Article 51)
- transmission of procedural documents by post (Article 52)
- direct transmission of requests for assistance (Article 53)

Draft EU Convention on Mutual Assistance in Criminal Matters

- relationship with
 - SIC
 - Draft Second Additional Protocol to the 1959 European Convention (CoE)
 - 1997 Naples II Convention (EU)
 -
- contents and evaluation
 - new developments: major changes

Relationship with the SIC

- additional to the SIC
- no integration of the full Schengen-*acquis*
- SIC: wider scope and more flexible as regards letters rogatory for search or seizure and assistance in fiscal matters
- ambiguous post-Amsterdam situation: two EU instruments/conventions supplementing the traditional CoE and Benelux instruments

Relationship with the Draft Second Additional Protocol to the 1959 CoE Convention

- total absence of co-ordination
- different legal solutions and options for the same problems (*forum regit actum*, controlled deliveries, infiltration, ...), not based on objective differences in the intensity of co-operation
- EU experimental garden for the CoE?

Relationship with the 1997 Naples II Convention

- choice for the judicial authorities in charge of the criminal investigation of customs offences, either to use the Naples II Convention or the regular channels of mutual legal assistance as a basis for requesting assistance or co-operation
- regular channels: 1959 CoE Convention, SIC, 1999 Draft EU Convention
- new co-operation mechanisms
 - cross-border observation/hot pursuit (copied from SIC)
 - controlled deliveries, covert investigations, joint investigation teams (also in Draft EU Convention)

New Developments (1)

- compliance with formalities/procedures indicated and deadlines set by the requesting state
- interception of (GSM and satellite) telecommunications
- cross-border use of technical equipment (for observation purposes)
- controlled deliveries

New Developments (2)

- covert investigations (infiltration)
- joint (multi-national) investigation teams
- spontaneous exchange of information
- sending and service of procedural documents
- hearing by video or telephone conference
- temporary transfer of persons held in custody for purposes of investigation
- direct transmission of requests

Compliance with Formalities/ Procedures and Deadlines Requesting State

- compliance with
 - formalities and procedures indicated by the requesting state
 - deadlines set by the requesting state
- duty to inform the requesting state
 - where the request cannot (fully) be executed in accordance with the procedural requirements set by the requesting state
 - if it is foreseeable that the deadline set for execution cannot be complied with

Formalities/Procedures (1)

- *locus regit actum*
 - 1959 European Convention - Article 3
- *forum regit actum* (1)
 - 1999 Draft EU Convention
 - undertaking to comply with formalities/ procedures expressly indicated by the requesting state, provided that these are not contrary to its fundamental principles of law
 - especially important in as far as the presence of the defence counsel at the execution of letters rogatory is requested for

Formalities/procedures (2)

- *forum regit actum* (2)
 - rationale: the procedural and investigative actions requested for should, to a maximum extent, be regarded as an extra-territorial extension of the criminal investigations or procedures in the *forum* state -international compatibility of evidence gathering is of growing importance, particularly in view of combating organised crime
 - not applicable as regards controlled deliveries and undercover operations
 - also in Draft Second Additional Protocol to the 1959 CoE Convention

Deadlines (1)

- 1999 Draft EU Convention
 - obligation to execute requests for assistance ASAP
 - obligation to take as full account as possible of any deadlines set
 - obligation for the requesting Member State to explain the reason for the deadline

Deadlines (2)

- 1998 Joint Action on good practice in mutual legal assistance in criminal matters (1)
 - obligation for the member States to deposit with the General Secretariat of the Council a statement of good practice in executing requests for legal assistance, including a.o. an undertaking to acknowledge, where requested to do so by the requesting state (i.e. in case of urgency or if necessary in the light of the circumstances of the case), all requests and written enquiries concerning the execution of requests, unless a substantive reply is sent quickly the request

Deadlines (3)

- 1998 Joint Action on good practice in mutual legal assistance in criminal matters (2)
 - acknowledgements must provide the requesting authority with the name and contact details of the authority/person responsible for executing the request

Interception of Telecommunications (1)

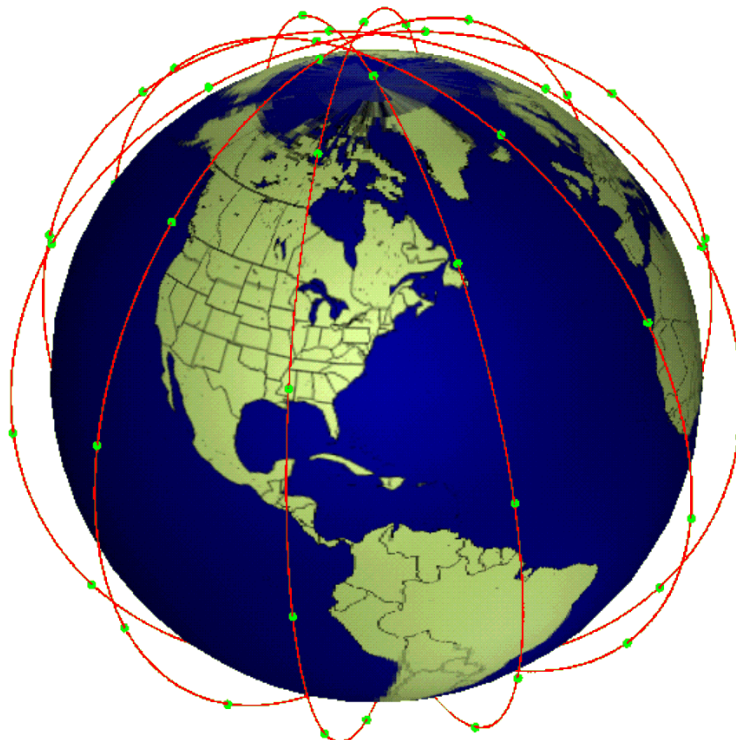
- no explicit, adequate legal basis in the 1959 CoE Convention or the SIC
- only Recommendation No R(85)10
- *real-time* interception, with direct transmission of the signal to a law enforcement monitoring facility (in another Member State): more efficient + *forum regit actum* (Council resolution of 17 Januari 1995 on the lawful interception of telecommunications)

Interception of Telecommunications (2)

- new, mobile telecommunication systems (GSM, satellite)
- GSM: SIM card = sole identification datum (roaming, ...)
- S-PCS-networks (Satellite Personal Communications System)
- LEO's/MEO's (versus GEO's)
- upgoing signal not interceptable

Interception of Telecommunications (3)

- network of gateways, i.e. points where the signal re-enters the earth infrastructure (ground stations) -one for an area covering the whole of Europe (e.g. Iridium® Italia)
- inter-satellite cross-links possible (e.g. Iridium®)
- adequate point for interception = state where the gateway is located
- first global system officially launched: Iridium® (23-9-1998 3 p.m.)





Interception of Telecommunications (4)

- 5 basic interception scenario's
- further (more complex) scenario's:
during interception, the target moves to a(nother) state, which is neither the requesting, nor the intercepting state (permission necessary; right to impose conditions for/prohibit the use of data gathered while the target was on its territory)
- service provider approach (first scenario: target in requesting state)

Interception of Telecommunications (5)

- application of the new rules limited to criminal investigations (= investigations 'following the commission of a specific criminal offence in order to identify and arrest, charge, prosecute or deliver judgement on those persons responsible')
- interceptions carried out by secret services (even where the results could eventually be used in criminal investigations) fall outside the scope of the Draft Convention

Cross-border Use of Technical Equipment (for Observation Purposes)

- Draft Protocol to the Draft EU Convention on mutual assistance in criminal matters
- provision for electronic surveillance on the territory of another Member State
- end of juridical vacuum/vagueness
- not (any more) within competence of the police
- prerogative of the judicial authorities

Controlled Deliveries (1)

- 1999 Draft EU Convention
- undertaking for the Member States to ensure that, at the request of another state, controlled deliveries may be permitted on its territory
- broader scope than illicit traffic in narcotic drugs and psychotropic substances (Article 11 of the 1988 UN Convention - Article 73 SIC)
- in the framework of criminal investigations into extraditable offences (point of reference?)

Controlled Deliveries (2)

- decision to carry out controlled deliveries/competence to act and to direct operations: taken by and lying with the competent authorities of the requested state
- law and procedures of the requested state applicable
- 1996 Naples II Convention: comparable, though not the same provisions
- Draft Second Additional Protocol to the 1959 European Convention: for particular offences (enumeration)

Covert Investigations (Infiltration) (1)

- until now
 - co-operation on police level, in a juridical vacuum
 - facilitated by e.g. the International Working Group on Undercover Policing (IWG)
 - 13 European states take part in IWG's activities
 - continuation of covert investigations on the territory of another state
 - placing of undercover agents at each other's disposal (IWG maintains a directory listing the special skills of the undercover agents of its member agencies)

Covert Investigations (Infiltration) (2)

- 1999 Draft EU Convention (1)
 - Member States may agree to assist one another for the operation of investigations into crime by officers acting under covert or false identity
 - 3 possible scenario's (implicitly)
 - decision on the request: taken by the competent authorities of the requested state with due regard to its national law and procedures
 - law and procedures applicable of the state where the action takes (no *forum regit actum*)

Covert Investigations (Infiltration) (3)

- 1999 Draft EU Convention (2)
 - duration/detailed conditions/preparation/supervision/security: agreed between both Member States
- 1996 Naples II Convention: different approach: only 1 scenario (continuation of covert investigations on the territory of the requested state)
- Draft Second Additional Protocol to the 1959 European Convention: only 1 scenario (continuation of undercover investigations on the territory of the requested state)

Joint (Multi-national) Investigation Teams (1)

- composed of judicial, police and/or customs officers or even of officials of international organisations/bodies (e.g. Europol)
- may be set up for a specific purpose and for a limited period
 - where difficult and demanding investigations having links with other states are required
 - where coordinated, concerted action between the states concerned is necessary
- headed and led by an official from the state where the team is operating
- seconded team members operating in another state shall be bound by the law of that state

Joint (Multi-national) Investigation Teams (2)

- apart from being allowed to be present when investigative measures are taken, seconded team members may be entrusted with the task of certain investigative measures
- team members may request their own authorities to take the necessary investigative measures in their own state as if they would be taken in a domestic investigation
- information lawfully obtained by seconded team members may be used in their own state
- also in the 1997 Naples II Convention (different rules)

Spontaneous Exchange of Information (1)

- *acquis*
 - 1967 Naples I Convention - Articles 8-9 (customs co-operation)
 - Article 46 SIC (police cooperation; information of interest in helping to prevent future crime and to prevent offences against or threats to public order and security)
- new
 - 1997 Naples II Convention - Articles 15-18 (customs co-operation)
 - Draft EU Convention

Spontaneous Exchange of Information (2)

- Draft EU Convention (1)
 - the competent authorities of the Member States may, within the limits of their national law and *without a request to that effect*, exchange information relating to criminal or administrative offences, the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided
 - the providing authority may impose binding conditions on the use of the information by the receiving authority

Spontaneous Exchange of Information (3)

- Draft EU Convention (2)
 - a.o. intended to facilitate the exchange of information that has come up during investigations, even before the closing thereof, unless this would be contrary to domestic law
 - advantage, compared to the possibility to lay information with a view to proceedings in another state (Article 21 of the 1959 European Convention): spontaneous exchange of information may also relate to offences the requesting state, at the time of exchange, is not competent to punish

Sending/Service of Procedural Documents (1)

- Draft EU Convention
- reinforcement and refinement of the *acquis* of Article 52 SIC
- obligation (instead of possibility) to send procedural documents intended for persons on the territory of another Member State directly by post
- limited number of cases where documents may still be sent via the traditional channels (between judicial authorities -Article 7 of the 1959 CoE Convention)

Sending/Service of Procedural Documents (2)

- SIC guarantees as regards translation of the (important passages of the) documents extended to sending and service of procedural documents via the traditional channels
- all procedural documents (sent directly by post or via the traditional channels) should be accompanied by a report stating that addressee may obtain information from the state where the document was issued regarding his/her rights and obligations concerning the document (e.g. if there is an obligation to appear)

Sending/Service of Procedural Documents (3)

- Articles 8, 9 and 12 of the 1959 European Convention applicable
- Draft Second Additional Protocol to the 1959 CoE Convention: no transmission by post of summons to suspects + optional requirement of forwarding a copy of the summons to witnesses or experts to the Ministry of Justice

Hearing by Video or Telephone Conference (1)

- Draft EU Convention
- no obligation to appear in 1959 CoE Convention
- hearing by video or telephone conference as an alternative solution
- hearing by video conference: important with a view to protecting crown witnesses or *pentiti*
- combination of a regular request for assistance and a direct exercise of jurisdiction
- requested state: summons, technical realisation, procedural guarantees, control

Hearing by Video or Telephone Conference (2)

- requesting state: hearing conducted by or under the direction of the judicial authority of the requesting state
- witnesses and experts (both investigation and trial stage)
- video conference for accused persons (trial stage): optional -opting out possibility -consent necessary
- necessary technical means for video conferencing may be made available by the requesting state

Hearing by Video or Telephone Conference (3)

- person to be heard may claim the right not to testify which would accrue to him/her under the law of either requested or requesting state
- protective measures may be taken
- perjury/unlawful refusal to testify punishable according to the national law of the requested state
- superior to the rules to be inserted in the Second Additional Protocol to the 1959 CoE Convention

Temporary Transfer of Detained Persons to the Requested State (1)

- temporary transfer of detained persons to the *requesting* state
 - 1959 European Convention (Article 11)
- temporary transfer of detained persons to the *requested* state
 - form of co-operation already provided for in bilateral MLAT's, additional to the 1959 European Convention
 - Draft EU Convention

Temporary Transfer of Detained Persons to the Requested State (2)

- Draft EU Convention
 - in the framework of an investigation requested for which the presence of a person held in custody on the territory of the requesting state is required (e.g. confrontation, reconstruction, recognition of places)
 - states may declare that the transfer to their territory will be dependant on the consent of the detainee
- Draft Second Additional protocol to the 1959 CoE Convention: consent required in all cases

Direct Transmission of Requests (1)

- Draft EU Convention
- reinforcement of the *acquis* of Article 53 SIC
- obligation (instead of possibility) to make requests for mutual assistance as well as spontaneous communications directly between the judicial authorities with territorial competence for their service and execution, and to return them through the same channels
- direct transmission possible of information laid with a view to proceedings in respect of any offences (not only infringements of the legislation on driving and rest time, as in Article 53.5 SIC)

Direct Transmission of Requests (2)

- states may declare that its judicial authorities do not (in general) have authority to execute requests received directly - in absence of such a declaration: autonomy for the local judicial authorities to execute requests received directly (and not only to receive them)
- limited number of cases where documents have to be sent via the central authorities (a.o. requests for temporary transfer)

Transfer of Proceedings

- traditional/present co-operation levels
- new/future co-operation levels

Traditional/Present Co-operation Levels

- CoE
 - 1972 European Convention on the Transfer of Proceedings in Criminal Matters (ratified by Estonia on 28 April 1997)

New/Future Co-operation Levels

- EPC (pre-Maastricht EU acquis)
 - Agreement of 6 November 1990 between the EC Member States on the transfer of proceedings in criminal matters
- EU
 - Article 30, under 2 TEU
 - facilitating and accelerating co-operation between competent ministries or equivalent authorities in relation to proceedings
 - ensuring compatibility in rules applicable in the Member States, as may be necessary therefore preventing conflicts of jurisdiction
 - Action Plan of 3 December 1998
 - prevent conflicts of jurisdiction ...

Transfer of the Enforcement of Foreign Judgements

- traditional/present co-operation levels
- new/future co-operation levels

Traditional/Present Co-operation Levels

–CoE

–not signed by Estonia

- 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
- 1970 European Convention on the International Validity of Criminal Judgements
- 2 Conventions on road traffic offences

–ratified by Estonia

- 1983 Convention on the Transfer of Sentenced Persons (on 28 April 1997)
- 1997 Additional Protocol (on 27 October 1999)

–Signed by Estonia on 25 June 1999/not ratified

- 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

New/Future Co-operation Levels (1)

–Schengen

- Articles 67-69 SIC: application of the 1983 CoE Convention on the transfer of sentenced persons in case of escape of a convicted person to his own country
- Convention on co-operation in procedures relating to road traffic offences with a view to the enforcement of fines which the offender has been convicted to pay (adopted by decision of the Executive Committee of 28 April 1999)

New/Future Co-operation Levels (2)

- EPC (pre-Maastricht EU acquis)
 - Agreement of 25 May 1987 on the application among the EC Member States of the CoE Convention on the transfer of sentenced persons
 - Convention of 13 November 1991 between the EC Member States on the enforcement of foreign criminal sentences

New/Future Co-operation Levels (3)

- EU
 - Article 30, under 2 TEU
 - facilitating and accelerating co-operation between competent ministries or equivalent authorities in relation to the enforcement of decisions
 - 1998 Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime
 - Draft Joint Action/Decision on asset sharing
 - October 1999 Tampere European Council
 - principle of enhanced mutual recognition of judicial decisions and judgements

Ne Bis In Idem

- traditional/present co-operation levels
- new/future co-operation levels

Traditional/Present Co- operation Levels

- CoE
 - Relevant provisions contained in *inter alia*
 - 1957 Convention on extradition
 - 1970 Convention on the International Validity of Criminal Judgements
 - 1972 Convention on the transfer of proceedings in criminal matters

New/Future Co-operation Levels

- Schengen
 - Articles 54-58 SIC
- EPC (pre-Maastricht EU acquis)
 - Convention of 25 May 1987 between the EC Member States on double jeopardy
- EU
 - Action Plan of 3 December 1998
 - establish measures for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the *ne bis in idem* principle

Tampere: Mutual Recognition

- political recognition of a need for enhanced mutual recognition of
 - judicial decisions (investigation stage - mutual assistance)
 - judgements (trial stage - transfer of the enforcement of foreign judgements)
- action plan for implementation of the mutual recognition principle to be adopted in December 2000

Tampere: Eurojust

- political recognition of the need to establish a judicial counterpart for Europol
- definition: international body, composed of national prosecutors, magistrates or police officers of equivalent competence, detached from each Member State according to its legal system
- to work closely together with the European Judicial Network and Europol
- legal instrument on Eurojust to be adopted by the end of 2001

Discussion/Questions